

## ORAL ARGUMENT NOT YET SCHEDULED

No. 23-1183 (and consolidated cases)

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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State of Ohio, et al.,  
*Petitioners,*

v.

Environmental Protection Agency and Michael S. Regan, in his official capacity,  
as Administrator of the U.S. Environmental Protection Agency  
*Respondents.*

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On Petition for Review of Action by the U.S. Environmental Protection Agency

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**EMERGENCY JOINT MOTION TO MODIFY BRIEFING SCHEDULE**

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## PETITIONERS' EMERGENCY JOINT MOTION TO MODIFY BRIEFING SCHEDULE

Pursuant to Federal Rule of Appellate Procedure 26(b), the Petitioners respectfully move the Court to adopt a modified schedule for briefing and argument in this and consolidated cases. Petitioners request that opening briefs be due thirty (30) days following any order of the Supreme Court of the United States disposing of several petitioners' requests for a stay pending review. All other deadlines would be correspondingly extended.

The consolidated petitions for review all challenge the final rule of the United States Environmental Protection Agency ("EPA") purporting to implement the requirements of 42 U.S.C. §7410(a)(2)(D)(i)(I) for the 2015 8-hour ozone national ambient air quality standards, *see Federal "Good Neighbor Plan" for the 2015 Ozone National Ambient Air Quality Standards*, 88 Fed. Reg. 36,654 (June 5, 2023) ("Final Rule"). The parties to this motion, their respective alignments, and the procedural background, are detailed at length in their joint proposed briefing schedule. *Joint Response, Utah v. EPA*, No. 23-1157 (D.C. Cir. Nov. 13, 2023), Doc. No. 2026766. Four petitions for review of the Final Rule were consolidated with this case after petitioners jointly filed their proposed scheduling request. *See Order, Utah v. EPA*, No. 23-1157 (D.C. Cir. Nov. 15, 2023), Doc. No. 2027156. This Court thereafter issued a scheduling order setting petitioners' opening briefs to be due on January 26,

2024. *Order, Ohio v. EPA*, No. 23-1183 (D.C. Cir. Dec. 4, 2023), Doc. No. 2029865.

The EPA respondents' brief is currently due in April 2024.

On September 25, 2023, this Court denied a stay pending review sought by several petitioners in the consolidated cases 23-1181, 23-1183, 23-1190, 23-1191, 23-1193, 23-1195, 23-1199, 23-1200, 23-1201, 23-1202, 23-1203, 23-1205, 23-1206, 23-1207, 23-1208, 23-1209, 23-1211. *Order, Ohio v. EPA*, No. 23-1183, (D.C. Cir.), Doc. No. 2018645. Several industry and state petitioners subsequently sought stays pending review at the Supreme Court of the United States pursuant to Supreme Court Rule 23. *See Ohio, et al. v. EPA, et al.* (U.S. No. 23A349); *Kinder Morgan, Inc., et al. v. EPA, et al.* (U.S. No. 23A350); *Am. Forest & Paper Assn., et al. v. EPA, et al.* (U.S. No. 23A351); *U.S. Steel Corp., v. EPA, et al.* (U.S. No. 23A384). On December 20, 2023—about two weeks after this Court issued its scheduling order—the Supreme Court ordered that argument be held on the requests for a stay pending review in the February 2024 argument session. *Order in Pending Cases*, 601 U.S. \_\_\_\_ (December 20, 2023). The exact date in February has not yet been set.

Pursuant to Rule 26(b), there is thus good cause to push merits briefing in this case until after the Supreme Court process for three primary reasons.

1. Under the current schedule, Petitioners' opening briefs are currently due *before* the argument on the Supreme Court stay request, while Respondents' and

Intervenors' responsive briefing is due *after* that argument. A modified briefing schedule would serve the interests of fairness and justice by avoiding that timing disparity.

2. As a matter of judicial economy, the stay-application process should also be completed prior to this Court moving on to the merits. The Supreme Court's disposition of the stay request may (and likely will) address some or all the issues presented in this case; conversely, not extending the briefing schedule would likely result in avoidable inefficiencies in the judicial process, which could further extend and exacerbate the harm experienced by Movants. A reasonably modified briefing schedule would serve the interests of judicial economy by obviating any need for motions for supplemental briefing in response to any action by the Supreme Court on the requests for a stay, and it would ensure all parties can fully and appropriately brief and address any disposition or opinions from the Supreme Court in their merits briefing before this Court.

3. Finally, preparing for oral argument while both drafting and finalizing merits briefs would force several petitioners to devote limited time and resources to both immense tasks at the same time. A reasonably modified briefing schedule with opening briefs due thirty (30) days after the Supreme Court's disposition of the stay

applications would permit the stay applicants to focus on oral argument preparation and then on merits briefing in turn.

Petitioners respectfully request expedited consideration of this motion by January 8, 2024, under Circuit Rule 27(f), given that Petitioners' respective merits briefs currently are due January 26, 2024.

The respondents oppose this motion. The EPA respondents oppose the delay of merits briefing on the basis of the Supreme Court's consideration of interim relief and reserves its right to file a response. But they indicated that, as a matter of professional courtesy, they would not oppose extending the deadline for Petitioners' opening briefs until April 1, 2024 with the remaining deadlines reset accordingly. The Intervenor-Respondents States of New York, Connecticut, Delaware, Illinois, Maryland, New Jersey, and Wisconsin, the Commonwealths of Massachusetts and Pennsylvania, the District of Columbia, the City of New York, and Harris County, Texas concur in the position of the EPA and reserve their right to file a response. The public-interest respondents oppose this motion in full. The State of Wisconsin, a petitioner aligned with the respondents, takes no position on the requested modification of the schedule, and does not oppose an extension of the schedule to a date certain, such as that proposed by the United States.

While EPA's proposal of an extension to April 1 is preferable to the current briefing schedule, there is no guarantee that the Supreme Court will have decided the pending stay applications by that date. Accordingly, to ensure that petitioners (and not just respondents and their intervenors) will be able to prepare their opening briefs with the benefit of the Supreme Court's decision, the Court should extend the deadline for petitioners' opening briefs until 30 days after the Supreme Court resolves the pending stay motions.

### **CONCLUSION**

Movants respectfully request that this Court modify its briefing schedule in these consolidated petitions so that Petitioners' opening briefs would be due thirty (30) days after any order or disposition of the pending requests for a stay by the Supreme Court of the United States. All other deadlines should be correspondingly extended.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed R. App. P. 32(f) and (g), I hereby certify that the foregoing complies with Fed. R. App. P. 27(d)(2)(A) because it contains 1,029 words, excluding exempted portions, according to the count of Microsoft Word.

I further certify that the motion complies with Fed. R. App. P. 27(d)(1)(E), 32(a)(5) and (6) because it has been prepared in 14-point Equity Font.

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 4, 2023, I caused the foregoing to be electronically filed with the Clerk of the Court by using the Court's CM/ECF system. All registered counsel will be served by the Court's CM/ECF system.

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